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No. 01-131

In The

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, and NANCY SANDINE,

Petitioners,

vs.

JO ANNE B. BARNHART, Commissioner of Social Security,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. INTRODUCTION

The government frames the issue in this case as posing a simple, stark choice. The government's own proposal is that counsel fees under 42 U.S.C. § 406(b) should be calculated using the methodology approved in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), for fee-shifting statutes. The only possible alternative to the *Hensley* methodology, the Solicitor General suggests, would be for the courts in all cases to award a 25% contingent fee, an alternative that the government's brief then attacks with enthusiasm. This Court, however, is entirely capable of framing a legal standard between these two alternatives; several lower courts have done so, and that is precisely the course which we urge.

The government's characterization of the alternatives between which the Court must choose appears to rest in part on a misapprehension of the position advanced by Petitioners. The government suggests, for example, that Petitioners recognize only a single consideration relevant to a fee determination: the amount of the recovery multiplied by 25%. It describes Petitioners as proposing a "single variable analysis" (U.S. Br. 15) – the sole variable apparently being the amount of benefits recovered – and as leaving federal judges "to their own devices" in deciding when a fee request could be disapproved. (U.S. Br. 18.) To the contrary, in our opening brief we identified at least four other factors which a court should also consider in determining whether a fee request is reasonable – whether the amount of the fee was "inordinately large" in comparison with the legal work done, whether the plaintiff's attorney was responsible for undue delay, the net fee the claimant would actually pay after deduction of any EAJA fee payable by the government, and the size of the combined fees for representation in court and representation in the administrative process. (Pet. Br. 17, 22-24, 33-34, 39-41.)

The government repeatedly objects that Petitioners propose an interpretation of section 406(b) under which

there would be no connection whatever between the fee awarded and the value of the legal services provided. (U.S. Br. 23.) To the contrary, it is our position that a court in determining a fee would be obligated to assure that the amount of any agreement-based fee was reasonable in light of the amount and nature of the legal services provided. (Pet. Br. 17, 24, 39.) On our view the non-contingent value of the legal services would not ipso facto *be* the appropriate fee, but that value would be relevant in determining whether the fee requested would be a "windfall." *Cf. Venegas v. Mitchell*, 495 U.S. 82, 85-86 (1990) (district court concluded that the fee provided for in a fee agreement was not a "windfall").

The government incorrectly describes Petitioners as urging this Court to adopt a "presumption" that the fee awarded under section 406(b) should be whatever fee (subject to the 25% cap) is in the fee agreement.[1] To the contrary, we acknowledge that the attorney seeking a fee award bears the burden of persuading the court of the reasonableness of a proposed fee. We made our position on this issue crystal clear in our opening brief: "the statute does not create any presumption in favor of the agreed upon amount." (Pet. Br. 40.)

The government's characterizations of our position may constitute, not a misunderstanding, but simply a rhetorical flourish. The Solicitor General may intend only to assert that our proposed standard, although on its face requiring judicial scrutiny of fee applications, will nonetheless result in practice in "blind" judicial approval of all contingent fee requests. The government, however, offers no explanation of why this would occur. Although the lower courts in several circuits already attach significance to the existence of fee agreements in section 406(b) cases, the government does not suggest that those courts have given unthinking approval to contract-based fee

[1] U.S. Br. i, 9 (twice), 15 (three references), 18 (twice), 19, 20, 23 (twice), 26, 28, 29 (twice), 30.

requests. The role accorded to federal judges by section 406(b) is in our view more limited in certain respects than that which judges typically play under fee-shifting statutes, but federal judges assuredly can be relied on to fill either role with care and diligence.

II. THIS COURT'S DECISIONS REGARDING FEE-SHIFTING STATUTES DO NOT RESOLVE THE ISSUES PRESENTED BY SECTION 406(b)

The premise of the government's brief is that in determining counsel fees under section 406(b) the courts should utilize the standard developed for calculating fees under fee-shifting statutes such as 42 U.S.C. § 1988. The practical problem posed by this suggestion is that section 406(b) cases ordinarily involve different circumstances and thus raise issues quite unlike what occurs under fee-shifting statutes. In section 406(b) cases (i) there is usually a contract between the attorney and claimant regarding the amount of the fee at issue, (ii) the net fee the claimant will actually pay often is greatly reduced by an EAJA[2] award, (iii) the total fees the claimant must pay is often increased by a separate additional award for work done in the administrative process, and (iv) the amount of the fee sought is ordinarily sufficiently small that any extended litigation would be prohibitively expensive. Because of the limited relevance of decisions under fee-shifting statutes, it is not always clear exactly what standard the government is urging this Court to adopt for section 406(b) cases.

(1) What Significance May Or Should Be Attached To A Contractual Agreement Between The Attorney And The Claimant?

The government in at least one passage appears to maintain that under its standard a court must consider

[2] 28 U.S.C. § 2412(d).

(along with other factors) the terms of such a fee agreement. (U.S. Br. 14 (" 'a private fee agreement is but one of the many factors to be considered' ") (*quoting* syllabus in *Blanchard v. Bergeron*, 489 U.S. 87, 87 (1989)).) Elsewhere consideration of this factor seems only permissible, but not mandatory. (U.S. Br. 12 ("the fee agreement itself may be a relevant factor").) The government insists that such a contract should not "blindly" be regarded as controlling, and that consideration of factors other than such an agreement should not be limited to unusual cases. (U.S. Br. 12-13, 15, 22, 24.) But that contention is entirely consistent with giving the contractual terms themselves substantial albeit not invariably controlling weight.

In addition, the government insists that section 406(b) should be interpreted in a manner consistent with the regulations regarding awards of "reasonable" fees under 42 U.S.C. § 406(a)(1) for legal representation in the administrative process. (U.S. Br. 26-29; *see* 20 C.F.R. § 404.1725 (2001).) Under those regulations the *amount* of the benefits won in a Title II case is expressly identified as a factor that should be considered in determining the size of a fee. 20 C.F.R. § 404.1725(b) (2001).[3] This is for all practical purposes the same as considering the terms of fee agreements, since such fee agreements themselves

[3] Section 404.1725(b)(1) identifies seven factors to be considered in determining a fee award under section 406(a)(1), including "(v) [t]he results the representative achieved." 20 C.F.R. § 404.1725(b)(1) (2001). In addition, section 404.1725(b)(2), while emphasizing that the results achieved are not the sole consideration, makes clear that it is a factor of no lesser importance than the other six criteria set forth in the regulation. "Although we consider the amount of benefits, if any, that are payable, we do not base the amount of fee we authorize on the amount of the benefit *alone*, but on a consideration of *all* the factors listed in this section." 20 C.F.R. § 404.1725(b)(2) (2001) (emphasis added).

usually base the size of a fee on the amount of the benefits obtained.[4] Elsewhere in its brief, on the other hand, the government seems to insist that a court should disregard entirely the amount of benefits won. (U.S. Br. 23.)

The importance of this issue is not limited to contingent fee agreements. Some fee agreements specify the hourly rate at which the attorney (if successful) would be paid[5]; it is unclear whether under the government's standard such an agreement could or should be considered by a court in determining the hourly rate in a lodestar calculation. Nor is it apparent how under the government's proposed standard a court should treat an agreement that the attorney would work for no fee at all or a settlement of the fee issue after the case was won.

(2) May Or Should A Court Consider The Total Net Fee That A Claimant Will Pay?

In a Title II case the section 406(b) award does not by itself determine how much the claimant must pay his or her attorney. The net fee the claimant will actually pay out of his or her back benefits will also be decreased by the amount of any EAJA award, or be increased by the amount of any fee awarded for legal representation in the

[4] The regulations are somewhat more generous. The "results . . . achieved" would presumably encompass consideration of the prospective value of future Title II benefits the claimant is likely to receive as a result of the legal representation. In many cases the amount of those future benefits will substantially exceed the back benefits on which a contingent fee agreement would be based.

[5] Pet. App. 50, 64. The government mistakenly describes these affidavits as characterizing the terms of the fee agreements in this case. (U.S. Br. 5 n.5.) In fact the affidavits, executed in February and April 1999, describe Tim Wilborn's then "current" fee agreements, not the agreements made the prior year to represent the clients in the instant cases.

administrative process. These adjustments can be of substantial importance. In the instant case, because the disputed 406(b) fee awards were smaller than the EAJA awards, Gisbrecht and Sandine paid no actual fee at all. Conversely, fee awards under section 406(a)(2) are subject to a separate 25% cap (thus allowing a combined fee of up to 50%), and fee awards under section 406(a)(1) are not subject to any percentage cap at all.

Under the standard we propose a court should take into account both of these possible adjustments in determining the amount of the section 406(b) award. (Pet. Br. 32-33, 41.) On our view the range of reasonableness limiting a section 406(b) award would take into consideration how much of the awarded back benefits the claimant will actually be left with after paying any fee awards.

The meaning of the standard proposed by the government is not entirely apparent. The United States correctly focuses on the issue of whether a proposed fee would have the effect of "unduly reducing the benefits upon which [claimants] rely to meet their daily expenses." (U.S. Br. 25.)[6] Reasonableness, the government suggests, requires consideration of the " 'totality of the circumstances'." (U.S. Br. 15 (*quoting United States v. Arvizu*, 122 S. Ct. 744, 751 (2002)).) These passages seem to indicate that under the government standard a court should consider the combined net fee to be paid. Elsewhere in its brief, on the other hand, the government appears to suggest otherwise, insisting that the amount of any lodestar calculation should be treated as presumptively controlling, perhaps conclusively so. (U.S. Br. 21-23.)

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[6] The United States twice quotes with approval a statement in our opening brief that "[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants." (U.S. Br. 20, 33.)

(3) Must A Court In A Section 406(b) Case Conduct A Full Dress *Hensley v. Eckerhart*, 461 U.S. 424 (1983) Inquiry?

The small size of section 406(b) claims poses an important problem of judicial administration. Under *Hensley*, 461 U.S. 424, the courts have developed standards and procedures for examining in considerable detail, and fully airing disputes about, counsel fees under fee-shifting statutes. In cases often involving many hundreds or thousands of hours, in which an additional $25 per hour may cost the defendant tens of thousands of dollars, such an exhaustive inquiry (or at least its availability) is often entirely sensible.

Applying the same standards and procedures to section 406(b) cases often involving less than 40 hours of legal work, on the other hand, could easily make litigating section 406(b) cases prohibitively expensive. That problem is compounded by the fact that, unlike practice under fee-shifting statutes, there is apparently no way to settle a section 406(b) claim.[7]

This Court's decisions regarding fee-shifting statutes did not undertake to address this practical problem. Accordingly, it is possible to find in those opinions passages which insist on full dress *Hensley* lodestar litigation, as well as passages extolling the importance of efficient judicial administration. The United States quotes both, without explaining how they are to be reconciled in cases such as this. *Compare* U.S. Br. 9 (lodestar calculation the " 'most useful starting point' ") (*quoting Hensley* 461 U.S. at 433) *with* U.S. Br. 32 (stressing the importance of

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[7] The Social Security Administration (SSA) does not have a process for settling section 406(b) claims. The most an attorney can hope for is that, after having invested the time and expense of presenting a full dress *Hensley* fee petition, the SSA will not object to the fee petition and the court will not sua sponte reduce the fee petition.

" 'ready administrability' ") (*quoting City of Burlington v. Dague*, 505 U.S. 557, 564 (1992)).

Under the standard we propose, the precise and often fiercely litigated *Hensley* calculation would be unnecessary if the court concluded that the fee requested was reasonable. The threshold reasonableness determination would itself be relatively simple. The district judge who had decided the merits of the claim would already be sufficiently familiar with the legal work done to be able to decide whether the fee requested was excessive. The judge would invariably know if there had been an EAJA award or undue delay, and there would not often be a significant dispute about the availability or likely size of any additional fee for representation in the administrative process.

In a Title II case, legal representation is usually limited to a summary judgment motion and supporting memoranda, all of which the district court would already have seen. A court's rough assessment of the amount of work needed to prepare these documents would be sufficient, since a precise lodestar calculation would not be necessary. Similarly, a judge's general knowledge of the local hourly rates would suffice, without need for affidavits or rate studies.

III. SECTION 406(b) DOES NOT REQUIRE A COURT TO DETERMINE WHAT COUNSEL FEE WOULD BE "THE *MOST* REASONABLE FEE"

The parties characterize in remarkably similar terms the purpose of section 406(b). The statute was enacted, they agree, to protect claimants from fees that were "inordinately large,"[8] excessive,[9] and or "abusive."[10] The parties disagree about how Congress intended to solve that

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[8] *Compare* U.S. Br. 21, 32 *with* Pet. Br. 9, 15, 19, 23.

[9] *Compare* U.S. Br. 22, 24 *with* Pet. Br. 14, 15.

[10] *Compare* U.S. Br. 9, and Br. Resp't Opp'n 16, *with* Pet. Br. 16.

problem. The government insists that section 406(b) directs federal judges in each case to determine with precision the "fee the court deems *the most reasonable*." (U.S. Br. 13 (emphasis added).)[11] On our view the courts have an important but more modest role. A federal judge should scrutinize a fee request to assure that the amount is not abusive or otherwise unreasonable; absent such a problem, however, the court would at least ordinarily approve whatever fee the claimant and attorney had agreed upon.

The government objects that under our standard a court would only disapprove a fee request if it were "abusive." (U.S. Br. 12, 15.) But only a few pages earlier in its brief the government describes prevention of "abusive" fees as the very purpose of the statute. (U.S. Br. 9.) That our proposed standard conforms to the congressional purpose is assuredly its very virtue. Similarly, the government at pages 22 and 24 of its brief asserts (correctly) that the purpose of the statute was to prevent "excessive" fees; then on page 25 of the same brief the United States objects that our standard only calls for disapproving fees where they are "excessive." If there is a difference between the government's characterization of the purpose of the statute, and its characterization of our proposed interpretation of that statute, that distinction is surely an elusive one.

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[11] *Hensley* and its progeny do not characterize the fee calculation method they establish as identifying "the most reasonable" fee. And they do not purport to address how to resolve the unique fee issues that arise under section 406(b). In this case, for example, Gisbrecht's attorneys won for him a total of $28,366 in past-due benefits, and under the contract entered into between Gisbrecht and the attorneys Gisbrecht had agreed to terms under which he would pay a fee of $7,091.50. *Hensley* does not hold that in such a case "the most reasonable" fee for Gisbrecht to pay is *nothing*.

The government also objects that if judges under section 406(b) can only reject a fee request because the amount is abusive or excessive, instances in which judges disapprove such fee applications will be "rare", "unusual", "infrequent", and "exceptional." (U.S. Br. 12, 15, 16, 20.) For our part we offer no prediction regarding how often disapproval would occur; the circumstances of these cases vary too widely to permit such a forecast. But the thrust of the government's argument remains obscure. Given the statutory purpose of preventing abusive fees, if abusive fees are today (or should in the future become) uncommon, then disapprovals *should* be equally infrequent.

The statutory language places two and only two limitations on a section 406(b) fee – it must be reasonable and it must not exceed 25% of back benefits. Nothing in the text or legislative history of the statute suggests that Congress intended to create yet a third unspoken limitation (that the parties can only agree upon "the most reasonable fee") on the ability of Title II claimants' "freedom to contract with their attorneys." *Venegas*, 495 U.S. at 87.

The government asserts that fee agreements in Title II cases should always be disregarded by the courts because they invariably are the unfair result of grossly unequal bargaining power. (U.S. Br. 20, 31 n.17.) In the past, however, the government has insisted to the contrary that section 406(b) was not enacted to work a wholesale invalidation of all fee agreements in Title II cases.[12]

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[12] U.S. Dep't of Health and Human Servs., Report to Congress: Attorney Fees Under Title II of the Social Security Act, 66 (1988) ("The 1965 Amendments were not designed to prohibit or discourage attorneys and claimants from entering into contingent fee agreements. The Amendments were designed to control the charging of 'inordinately large fees' in court cases and to assure attorneys that they would receive appropriate fees for representing claimants.").

Although the Congress which enacted section 406(b) objected to contingent fee agreements providing for a fee of 50% of the award, such agreements were not the result of some special inability of Title II claimants to negotiate more favorable arrangements. To the contrary, at the time when section 406(b) was adopted, 50% fee agreements were a widespread phenomenon in many areas of litigation, and section 406(b) was part of a general movement to lower that rate.[13] The fact that today most Title II fee agreements call for a 25% fee does not indicate some lack of bargaining power on the part of claimants. Because the generally prevailing rate for contingent fee representation is 33%[14], the section 406(b) 25% standard is a form of price control; Title II fee agreements are generally at that level because, in a free market, they would like other agreements be higher. If section 406(b) capped fee agreements at a mere 1%, fee agreements would also use that statutory ceiling.

The government objects that if Congress had intended only to assure that fees were non-abusive, it was "odd" that Congress framed the statute as a requirement that the fee be "reasonable." (U.S. Br. 24.) But as we explained in our opening brief, "reasonable" was the very term that the courts and bar associations used in 1965 (and today) to distinguish non-abusive fees from fees that are excessive. (Pet. Br. 17.)

The government suggests that if Congress intended only to direct judges to reject excessive fees, it would

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[13] F.B. MacKinnon, Contingent Fees for Legal Services, 160-65 (1964).

[14] *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998); *In re: Continental Illinois Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992); H. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L.Rev. 267, 285-86 (1998).

have utilized language similar to that then found in section 406(a), which in 1965 provided that the agency "may, by rule and regulation, prescribe the maximum fees which may be charged" for services in the administrative process. (U.S. Br. 16 (emphasis omitted).) But this (now repealed) provision in section 406(a) had a meaning entirely different from the traditional common law limitation on excessive fees. This language in section 406(a) authorized the agency to establish a fixed fee schedule; the regulations in effect in 1965 under section 406(a) limited fees to $20 for work done before the (then) Bureau and $30 for representation before a hearing examiner and the Appeals Council. 20 C.F.R. § 404.976 (1961). These ceilings were entirely unrelated to the amount of work an attorney might have devoted to a particular case. Against that background, Congress in framing statutory language to limit abusive fees would not have used the phrase "maximum fees," words which would have been understood to envision a fixed fee structure barring non-abusive fees as well. To the contrary, given the legal context of the time, "reasonable" was precisely the appropriate term of art.

In the alternative, the government relies on the current language of section 406(a)(2)-(3). That provision, it notes, contains an express statutory presumption requiring use of a fee agreement; thus, the more general language of section 406(b), it insists, cannot be construed to include the same presumption. (U.S. Br. 26-29.) This argument, however, is directed at refuting a position which we have not advanced. Section 406(a)(2) illustrates what would constitute a binding presumption. The SSA is generally *required* by section 406(a)(2) to award whatever fee is authorized by a fee agreement (subject to the statutory caps); an objector who opposes implementation of the agreement bears the burden of proof, and must demonstrate that the fee would be "clearly excessive." 42 U.S.C. § 406(a)(3)(A). But we do not urge that section 406(b)

should be construed to create such a presumption, or to shift to the SSA the burden of demonstrating the unreasonableness of a fee request. To the contrary, we agree that under section 406(b), unlike section 406(a)(2), the burden of establishing reasonableness is on the attorney seeking the fee.

The government objects that if a fee award is based (perhaps even in part) on a contingent fee agreement, attorneys who provided identical services may receive substantially different fees. But the government's own section 406(a)(1) regulations, which base fee awards in part on the amount of back benefits obtained, mandate just such a disparity. The 25% cap in section 406(b) will also dictate that lawyers subject to the cap will receive smaller fees than lawyers who provided the same services but who avoided the limitation because their clients happened to receive larger back benefits. Attorneys who provide identical services will receive dramatically different fees if only one of the cases is successful. Most importantly, if – as the government acknowledges – the overarching focus of section 406(b) is on how much of the awarded benefits will actually be received by a claimant, then what matters is not whether lawyers who perform comparable services get identical fees, but whether claimants awarded similar benefits actually receive comparable post-fee payments.

The government properly expresses concern that attorneys not be permitted to increase their fees by resorting to delaying tactics.[15] (U.S. Br. 24.) But there is no claim that that occurred in these cases. To the contrary, the claimants' attorneys required an average of only 58 days per case to prepare and file their main and reply briefs on the merits. (*See* Appendix to Reply Br. for the Pet.) Delays for which the SSA was responsible were far longer; the administrative proceedings which preceded

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[15] The 25% cap has the same potential to reward delay.

the litigation averaged 1,357 days. (*Id.*) Further, in any case in which a claimant's attorney is responsible for undue delay, a court is perfectly competent to reduce the fee accordingly.

The language of section 406(b) authorizing a judge to "determine" a reasonable fee does not by itself provide guidance regarding *how* that determination is to be made. The fact that a judge in making such a determination may look to the terms of a fee agreement (a consideration the government may or may not actually object to) does not mean that the judge him- or herself is not making the ultimate decision. Even under the lodestar method, decisions made earlier by attorneys – to devote more or fewer hours in a case, to develop a particular legal or factual argument, to allocate work among partners, associates and paralegals[16] – will often be of controlling importance to the judge's fee calculation. Congress's decision to require that the fee awarded be "reasonable" does not mean that Congress believed that fee requests could be ranked in order of increasing reasonableness, or that it wanted the judge to pick the "most reasonable" fee. The rule that only men can play on a men's table tennis team does not mean that coaches are supposed to select the most manly team applicants.

The government does not contend that the fees requested in the instant case were abusive or otherwise unreasonable. Indeed, the government has not asserted that it would have been an abuse of discretion for the district courts to have awarded larger fees, even as large as the fees requested. Nothing in the text or legislative history of section 406(b) suggests that Congress intended

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[16] *E.g., Blumenthal v. G-K-G Inc.*, No. 1:89CV8693, 1993 WL 414686 at *3 (N.D.Ill. Oct. 15, 1993) ("Moreover, even if R & W's staffing choices were somewhat unorthodox, this court is reluctant to second guess its decisions absent a stronger showing of abuse").

in such circumstances to substitute the discretion of a federal judge, however wise and experienced, for the contractual agreement between the attorney and client, or to compel the attorney (without possibility of recompense) to expend substantial time, effort, and expense to elicit an exercise of that discretion.

IV. ENHANCEMENT OF FEE AWARDS UNDER SECTION 406(b) IS NOT PRECLUDED BY THIS COURT'S DECISION IN *CITY OF BURLINGTON V. DAGUE*, 505 U.S. 557 (1992)

Determination of whether contingency enhancement is appropriate under section 406(b) requires this Court to resolve which of two distinct lines of cases should control. As we noted in our opening brief, and the United States does not dispute, it was well established in 1965 that a court required (by the absence of a determinative fee agreement) to decide the value of legal services provided by an attorney to his or her own client would award a larger fee if payment was contingent on the success of the litigation. (Pet. Br. 42-43.) On the other hand, under fee-shifting statutes contingency enhancement is not authorized. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

The common law rule provides the more appropriate precedent for construing section 406(b). *Dague*, like this Court's other fee-shifting cases, "did not address contractual obligations of plaintiffs to their attorneys; it dealt only with what the losing defendant must pay the plaintiff." *Venegas*, 495 U.S. at 89. In *Dague* the United States argued that enhancement was inappropriate precisely *because* the fee in that case was to be paid by the defendant rather than by the attorney's own client.[17] *Dague*

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[17] Br. for the U.S., No. 91-810, 20 n.19 ("Contingency fees are typically used in private tort law, where the fee is paid out of the successful plaintiff's damage award. In that context, it is at

itself recognized that lawyers reasonably charge their clients more in cases where the client agrees to pay only if he or she prevails. *Dague*, 505 U.S. at 565-66. The United States does not suggest that there is anything inherently unfair or abusive about such fee agreements.[18]

If Mr. Gisbrecht had retained attorney Wilborn in connection with any other litigation, Gisbrecht would undoubtedly have had to agree to a higher fee level if he refused to pay any fee at all if the case were lost. In the instant case it is federal law that precluded Wilborn from charging or even accepting any fee from Gisbrecht if the litigation did not result in an award of benefits. But the higher fee that would normally result from such a restriction is no less reasonable because the restriction comes from the government. In both cases the additional consideration received by the client – exemption from any fee obligation if the case is unsuccessful – is the same, and supports the reasonableness of the additional consideration – contingency enhancement – received by the attorney.

Dague declined to permit contingency enhancement under fee-shifting statutes because such enhancements would result in a hybrid fee arrangement distorted to favor one party. *Dague*, 505 U.S. at 566. The government

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least roughly equitable to tie the attorney's fee to the size of the damage award obtained through his efforts. . . . The rationale applicable to the situation in which the fee is paid out of the recovery obtained by the plaintiff is simply inapplicable where there is no such fund, and the award is paid directly by the defendant."); Transcript of Oral Argument, *City of Burlington v. Dague*, 1992 WL 687821 at *19-*20, *24-*26.

[18] *See also* C. Silver, Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There From Here, 74 Tul.L.Rev. 1809, 1826 (2000) ($35 million contingent fee agreement made by Cravath, Swaine & Moore, payable only if proposed corporate merger was successful).

proposes to construe section 406(b) to concoct a hybrid scheme with the same vice. The statutory 25% cap builds the contingent-fee model into the statute itself, codifying the very principle rejected for fee-shifting statutes by *City of Riverside v. Rivera*, 477 U.S. 561 (1986). On the government's view, however, that same contingency-fee model should be disregarded in determining what fee should be awarded at or below the cap. The result would be that in Title II cases the contingent-fee model would be resorted to only to reduce, but not to increase, the fee award. If such one-sidedness was inappropriate in *Dague*, it is equally inappropriate here.

The government invokes the pivotal reasoning in *Dague* that under fee-shifting statutes a contingency enhancement " 'would likely duplicate' " factors already subsumed in the lodestar, since cases with a greater risk of loss would often be cases in which the greater difficulty would by itself warrant a higher fee. (U.S. Br. 31 (*quoting Dague*, 505 U.S. at 562).) "Taking account of it again through lodestar enhancement amounts to double counting." *Dague*, 505 U.S. at 563. Only two pages later in its brief, however, the government apparently maintains that Title II cases will rarely if ever involve the sort of complex legal or factual issues that would warrant the higher lodestar (and thus the risk of double counting) invoked in *Dague*. (U.S. Br. at 33.)

As we explained in our opening brief, paying an attorney $150 an hour while limiting payment to the one-third of Title II cases that are typically won means that on average an attorney who takes such cases will over time actually receive only $50 an hour. The government does not dispute that fact, but insists a lower hourly rate is appropriate because in its view Title II cases are comparatively simple. (U.S. Br. 33.) But this is double counting (or, more accurately, double subtracting) with a vengeance. If a given Title II case is relatively easy, that should already result in a lower lodestar figure. The very same reason

cannot then fairly be invoked to further reduce the average fee by two-thirds.

There is evidence indicating that the low level of fees in Title II litigation has a pronounced impact on the availability of counsel. In the administrative process, where the terms of contingent fee agreements generally control because of section 406(b)(2), losing parties almost invariably appeal to the next level of review. Of the claimants who lose before ALJs, over 90% appeal to the Appeals Council.[19] But of applicants whose claims are denied by the Appeals Council, less than 15% seek review in federal court.[20] This disparity exists even though claimants have a far higher chance of success in federal court than they do at the Appeals Council.[21] That disparity necessarily reflects the reluctance of attorneys who represented Title II claimants in the administrative process to continue to do so in federal court; the claimants themselves would assuredly have wanted to challenge an adverse Appeals Council decision if legal representation had still been available.

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[19] In Fiscal Year 2000, there were 125,739 denials by ALJs, and 122,780 appeals decided by the Appeals Council. Social Security Advisory Board, Disability Decision Making: Data and Materials (2001) (Disability Data), 86, *available at* http://www.ssab.gov/chartbookB.pdf. (Although this data includes both Title II and SSI claims, the former outnumber the latter.) In three-quarters of Title II claims tried before ALJs the claimants are represented by counsel. Social Security's Processing of Attorney Fees: Hearing Before the Subcommittee on Social Security of the House Committee on Ways and Means, 107th Cong., 1st Sess., 21-22 (2001) (statement of Barbara Bovbjerg, U.S. General Accounting Office).

[20] In FY 2000 there were 90,857 denials by the Appeals council, and 12,011 federal court decisions. Disability Data, 86.

[21] In FY 2000 the Appeals Council denied or dismissed 76% of all claims, while federal courts denied or dismissed only 45% of the claims they heard. Disability Data, 86.

No less importantly, an interpretation of section 406(b) which limits fees to a lodestar calculation without any contingency enhancement is likely to affect adversely the quality of representation available to Title II claimants. If attorneys with a Title II practice can receive on average only $50 an hour (one-third of the $150 median hourly rate in Portland),[22] lawyers skilled enough to bill $100 or $150 an hour from some other form of practice will not ordinarily take Title II cases. Attorneys who can attract clients paying $150 per hour will be unlikely to handle Title II litigation except where they can identify claims whose chance of success is far above the 35% national average. An attorney's legal skills, of course, do not invariably correlate with the hourly rate he or she can command. But a system which limits most Title II cases to lawyers unable to earn more than one-third the hourly rate of their peers would "depriv[e] a plaintiff of the option of promising to pay more . . . if that is necessary to secure counsel of their choice" and would thus frustrate the goal "of enabling plaintiffs . . . to secure competent counsel." *Venegas*, 495 U.S. at 89-90.

The decision in *Dague* rested in part on the difficulty of determining how much a fee shifting award should be enhanced because of the element of contingency. 505 U.S. at 566. But where, as here, the fee is to be paid by the attorney's own client, the existence of a contingent fee agreement provides a ready solution. The use of contingent fee agreements – or, more precisely, the fact that a fee paid under such an agreement often exceeds what would have been charged on a non-contingent basis – has traditionally been justified by the contingency risk. Under contingent fee agreements that difference is accepted precisely because it is a form of contingency

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[22] Flikirs Prof'l Servs., Oregon State Bar: 1998 Economic Survey (Oct. 1998), 31 (Pet'r App. 92).

enhancement.[23] The amount of that enhancement is governed, not by some percentage calculation, but by the percentage cap on the fee contained in the agreement itself. So long as the attorney can persuade the court that the resulting fee is not abusive or otherwise unreasonable, the contingency enhancement inherent in the fee agreement is the appropriate enhancement under section 406(b).

Respectfully submitted,

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[23] F.B. MacKinnon, Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities, 159 (1964).

APPENDIX TO REPLY BRIEF FOR PETITIONERS

Length of Administrative Proceedings

	Petitioner		
	Gisbrecht	Miller	Sandine
Application	1/27/94	2/23/93 & 3/16/93	7/27/93
ALJ decision	9/27/96	3/7/95	4/18/96
Appeals Council denial	3/18/98	4/19/96	6/4/97
Total Days to Exhaust Administrative Remedies	1,511 (4.14 years)	1,151 (3.15 years)	1,408 (3.86 years)

App. 2

Length of Merits Judicial Proceedings

Petitioner Gisbrecht

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	4/6/98 7/13/98		98
answer until plaintiff's merits brief	7/13/98 8/14/98	32	
plaintiff's merits until order of settlement	8/14/98 10/16/98		63
Total		32	161

App. 3

Petitioner Miller

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	6/17/96 9/4/96		78
answer until plaintiff's merits brief	9/4/96 11/14/96	71	
plaintiff's merits brief until defendant's motion to remand	11/14/96 1/6/97		53
defendant's motion to remand until plaintiff's opposition to motion to remand	1/6/97 2/6/97	31	
plaintiff's opposition until defendant's reply	2/6/97 2/21/97		15
defendant's reply until judgment	2/21/97 10/7/97		228
Total		102	374

Petitioner Sandine

Events	Dates	Waiting for plaintiff (days)	Waiting for defendant or court (days)
complaint until answer	7/30/87 10/24/97		86
answer until plaintiff's merits brief	10/24/97 11/25/97	32	
plaintiff's merits brief until defendant's merits brief	11/25/97 1/5/98		41
defendant's merits brief until plaintiff's reply brief	1/5/98 1/13/98	8	
plaintiff's reply brief until judgment	1/13/98 4/13/98		90
Total		40	217